

DEPARTMENT OF STATE A/CDC/MIR

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DECLASSIFIED FORN SERVICE DESPATCH

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TO THE DEPARTMENT OF STATE, WASHINGTON.

May 21, 1952

REF Embdes 1, April 30, Embdes 13, May 6, 1952

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SUBJECT: Transmittal of Memoranda of Conversation on FCN Discussions

There are enclosed copies of the Embassy's version of various memoranda of conversation with Japanese officials on the proposed FCN Treaty. These memoranda are listed below, each with a summary of the principal proposals and suggestions made by the Japanese side:

1. Eighteenth Meeting, April 22, 1952 (Enclosure 1):

The proposal that a provision be added to the Protocol establishing an exception to MFN treatment with respect to Japan's proposed extension of special rights and privileges to certain Korean nationals (page 3).

2. Nineteenth Meeting, May 6, 1952 (Enclosure 2):

The request for further clarification of Article VII and the suggestion that paragraph 1 (b) be rephrased to specify MFN treatment or that the phrase "general company laws" be qualified if MFN treatment is intended (page 2).

3. Twentieth Meeting, May 8, 1952 (Enclosure 3):

A discussion of general terms employed in the Treaty, on which the Department's comments would be appreciated.

4. Twenty-first Meeting, May 12, 1952 (Enclosure 4):

a. Additional definitions, including a Japanese suggestion (pages 6 and 7) that either "allocable" or "apportionable" be deleted from Article XI, since it was believed that one word would suffice;

b. The suggestion that the phrase "access to courts" in Article XXI be expanded to read "access to the courts of justice and to administrative tribunals and agencies", as in Article V (page 10); and

c. The suggestion that the location of the phrase "within the territories of the other Party" be changed in Article II, paragraph 2; in Article III, paragraph 1; and in Article V, paragraph 1 (pages 10 to 12).

With reference to the question raised in the Department's A-677 of April 11,

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1952 in connection with Article IV, attention is invited to an additional statement in the memorandum on the 19th meeting (Enclosure 2, page 4) on Japan's social security system. The Japanese stated that, aside from the National Health Insurance System, all other forms of workmen's compensation and social security in Japan were of the compulsory insurance type.

Japanese revisions of and corrections to the Embassy's version of the memorandum of conversation have been submitted only up to the 12th meeting (Enclosure 2 to despatch 13, May 6, 1952). The following changes of substance have been made in the versions previously submitted to the Department:

a. Eleventh Meeting, March 28, 1952 (Enclosure 1 to despatch 13, May 6): The mention of paragraph 1, Article XIV on page 5 of this memorandum is in error, the correct reference being paragraph 3 (a), Article XIV. The proposed Japanese reservation should therefore read: "It is understood that the provisions of paragraph 3 (a), Article XIV, shall not obligate either Party...";

b. Ninth Meeting, March 20, 1948 (Enclosure 5 to despatch 1, April 30): This memorandum was changed substantially at the request of the Japanese officials. The second sentence of the first paragraph, top of page 2, now reading "He emphasized that such restrictions..." was revised to read "He emphasized that dollars will flow into Japan from non-dollar sources, but that, although there were indications that a considerable amount of such dollars was already flowing into Japan through Hong Kong, Japan would in some cases be unwilling to permit such an in-flow of dollars."

The second and third paragraphs (beginning "Mr. Otake stated that..." and "Mr. Adams reminded Mr. Otake...") were deleted at the request of the Japanese, as was also the clause "and of its own controls with respect to the communist bloc" in the last sentence of the fourth paragraph. The fifth paragraph on this page was also deleted at Japanese request, and the following two paragraphs (on which the Department's comments are requested) were inserted in its place:

"Mr. Otake then asked if it was understood that paragraph 2, Article XII, shall not be construed to preclude either Party from exercising such restrictions as are necessary to regulate the in-flow of capital, as is provided for under Section 3, Article VI, of the Articles of the International Monetary Fund."

"Mr. Adams replied that he believed that Article XII of the standard draft was intended to embody the rights and obligations a Party might have under the Articles of Agreement of the International Monetary Fund. It would appear therefore that Mr. Otake's understanding of paragraph 2, Article XII, was correct. Mr. Adams added that he was not prepared to give a definitive answer on this point, and that he would refer Mr. Otake's question to the Department of State for further clarification."

It will be noted (page 12, Enclosure 4) that the 21st meeting was the last of the present round of informal discussions. It was agreed that the final

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review meetings could begin about June 9, 1952. The Japanese representatives stated that, although final texts of a number of the memoranda - including that on the 4th meeting - were not available, there would be sufficient material prior to June 15 to warrant the opening of the final review meetings. The Department's continued efforts to instruct the Embassy on the various points at issue prior to that date will be appreciated.

For the Ambassador:

Frank A. Waring
Frank A. Waring
Counselor of Embassy
for Economic Affairs

Enclosures:

Memoranda of Conversation:

1. Eighteenth Meeting (April 22, 1952)
2. Nineteenth Meeting (May 6, 1952)
3. Twentieth Meeting (May 8, 1952)
4. Twenty-first Meeting (May 12, 1952) also Doc # 108

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Enclosure. 1. Page 1
Despatch 98 - Tokyo

Office of the United States Political
Adviser for Japan,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft
Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OZABE, Vice Director, Economic Affairs Bureau
Mr. Haruki IRI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEYATSU, Secretary, First Section, Economic
Affairs Bureau
Mr. Kiyoshi MIYAGAWA, Secretary, First Section, Economic Affairs
Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASKIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser for Japan, Tokyo.

Date: Tuesday, April 22, 1952.

EIGHT WITH INFORMAL MEETING

PROTOCOL

Mr. Yukawa suggested that a reservation be put in the Protocol to the effect that the most-favored-nation treatment prescribed in the FCN Treaty would not apply to such special rights and privileges as might be given to Koreans in Japan. He added that as long as Koreans now in Japan continue to reside in Japan, they may be granted certain special rights and privileges which they had acquired as a result of their previous Japanese nationality. These special privileges would pertain to their continued residence in Japan, and to certain property rights and the exercise of certain professions that might not be accorded or permitted to other foreigners. This special treatment was based on the long-standing and unique relationship existing between Japan and Korea, said Mr. Yukawa, and such special treatment should therefore not come within the purview of the most-favored-nation treatment clause of the FCN Treaty under discussion.

Mr. Adams asked what special rights and privileges would be accorded by Japan to such Korean nationals. Mr. Otake replied that it was difficult

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to give precise details at this particular time inasmuch as Japan was currently negotiating a treaty which would establish the basic relations between the Republic of Korea and Japan, and which would stipulate these social rights and privileges.

With respect to property rights, Mr. Otake made reference to the reservation in paragraph 2, Article VII, on the exploitation of natural resources. He stated that some Korean nationals presently in Japan are owners of mining rights acquired during their previous status as Japanese nationals. The continued holding of such mining rights by these Korean nationals, he added, should not establish a basis for invoking the most-favored-nation principle.

Mr. Otake then stated that the highlights of the problem involving persons of Korean origin who are to lose their Japanese nationality and acquire Korean nationality on the coming into effect of the Treaty of Peace are: (1) Koreans who were in Japan before September 2, 1945, will require no application or visa to be permitted to remain in Japan as permanent residents; (2) such Koreans will not be subject to normal deportation regulations and will be deported only after consultation between the appropriate Japanese immigration authorities; (3) Koreans who are engaged in professional activities which are normally reserved to Japanese nationals will be permitted to continue in these professions; and (4) Koreans who, on the day of the coming into force of the Treaty of Peace with Japan, possess property rights of a kind which would normally not be allowed to come under alien ownership, will be permitted to retain such property rights.

Mr. Otake observed that this problem was not only related to Koreans but also to other former Japanese nationals who would lose their nationality as a result of the Peace Treaty. He added that while this question might again be raised in the future with reference to other aliens of former Japanese nationality, the problem of Koreans of ex-Japanese nationality was of special importance at this time in view of the current negotiations on a treaty and various agreements between Korea and Japan.

Mr. Singer asked whether the Japanese Government believed that this extension of special rights and privileges to Koreans of ex-Japanese nationality would be of a temporary nature. Mr. Nagai replied that it was generally believed that most of these would be of a temporary nature, particularly with respect to residence rights, a point which might be renegotiated at some future date. He stated that the privilege of holding certain types of property, such as mining rights, might, however, be extended on a permanent basis.

Mr. Otake added that, for example, many Koreans in Japan are dependent on public assistance from the Government and that it was believed that such public assistance would be extended to such Koreans only for a limited period of time. This point also depended on the outcome of current and future negotiations between the two countries.

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Mr. Nagai then stated that the Japanese Government was of the opinion that these special rights and privileges would not be extended to the Korean heirs of the individuals to whom these were presently granted. He added that residence and similar rights would be lost by such Koreans of ex-Japanese nationality upon their departure from Japan (other than on a short visit abroad). With respect to property rights, including mining, these could be held only during the lifetime of the Korean to whom the right was extended. His Korean heir, stated Mr. Nagai, not being of ex-Japanese nationality, could not inherit property rights normally forbidden to aliens.

Mr. Bassin stated that he understood that all Koreans in Japan would automatically lose their Japanese nationality and acquire Korean nationality as a result of the treaty currently being negotiated by the two countries. He added that he further understood that the reservation mentioned by Mr. Yukawa was designed to ensure that Japan would be free to extend the special rights and privileges contemplated without violating the most-favored-nation standard of the FCN Treaty with the United States.

Mr. Yukawa stated that this understanding was correct, and he then proposed that the following be added to the Protocol of the FCN Treaty under discussion:

"The most-favored-nation treatment prescribed in this Treaty shall not apply with respect to those rights and privileges which persons of Korean origin acquired in Japan as Japanese nationals, and which they may be permitted by Japan to retain after they have acquired the nationality of the Republic of Korea."

Mr. Adams said that this proposed reservation would be made of record tentatively for the purpose of these informal discussions as paragraph 7 of the Protocol, and that it would be referred to the Department of State for its consideration.

Mr. Yukawa then asked for an expression of the views of the American side with reference to an Article in the 1911 Treaty between Japan and the United States concerning military service. He stated that there was interest on the Japanese side in the possible inclusion of a provision in the FCN Treaty under discussion which would exempt the nationals of either party from service in the armed forces of the other, as well as from contributions in money or in kind in lieu of such military service.

Mr. Adams replied that it is no longer the policy of the United States to enter into treaty undertakings which would grant exemptions from military service, and that the treaties most recently negotiated by the United States therefore contain no military service provisions. He added that the United States could not enter into such an undertaking in view of the action taken by the United States Congress in 1951 in amending the Selective Service Act so as to make all aliens entered for permanent residence subject to the military draft.

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Mr. Otake stated that Japan was interested primarily in the individuals who went to the United States as treaty traders and students, who should not, in his opinion, be subject to the Selective Service Act. He added that, since Mr. Adams' statement referred to "aliens entered for permanent residence", it was the understanding of the Japanese side that individuals entering the United States for a temporary and limited stay, including treaty traders and students, were not subject to the military draft laws of the United States.

Mr. Adams explained that all individuals, including students and treaty traders, entering the United States for other than a short visit were required to register under the Selective Service Act. Japanese students and treaty traders would, upon their registration, normally be placed in one of the categories exempting or deferring an individual from actual drafting into the military service. Foreign students, for example, are normally deferred from military service by their classification under category 4 (b) of the Selective Service Act. Mr. Adams further stated that this same classification, or some other also implying deferment from service, would probably be used in the case of Japanese treaty traders. He explained that each local draft board in the United States might apply different standards, and that it was not possible for one board to classify an individual for military service, while another board in like circumstances would grant a deferment. A registrant under the Selective Service Act, however, has the right to demand a review of his case with a view to his reclassification. In the case of a foreign student or treaty trader such a request for deferment or for appropriate reclassification under the Act might properly be submitted through his diplomatic or consular representative. Mr. Adams added that he understood that the review authorities concerned with Selective Service administration were quite liberal in their interpretation of the various classifications, and that it was anticipated that any bona fide student or treaty trader would be so classified upon his registration that he would not normally be subject to military service.

Mr. Yukawa then referred to Article VII of the GATT, and stated that it was believed that a provision of this type might properly be included in the FCIT Treaty. He stated that, in the absence of a standard for determination of the value of goods for customs purposes and a criterion for its application, it would be possible to set a value on goods that would have the effect of unreasonable restrictions on their importation.

Mr. Otake added that Article XXIV of the Japanese draft FCIT Treaty, which had previously been discussed in December, 1951 between the American and Japanese representatives, had been drafted along the lines of Article VII of the GATT. This proposed article would establish that the actual value (i.e., "the price at which, at a time and place determined by legislation on the part of the importing country, and in the ordinary course of trade, such or like article is sold or offered for sale under fully competitive conditions") of goods would be used as the basis for customs valuation, rather than any arbitrary or fictitious value.

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Mr. Singer replied that the United States position was that the GATT principle that valuation be based on actual rather than arbitrary values was a sound one. He pointed out that Article VII of the GATT was, however, being applied provisionally (under the Protocol of Provisional Application) only "to the fullest extent not inconsistent with existing legislation". He added that a number of changes in United States customs valuation laws would be necessary to bring them into full conformity with the GATT article, and that a general multilateral settlement might be the appropriate medium for any negotiated changes.

Mr. Adams added that United States customs valuation is based on the "American selling price" principle, the abolition of which has been opposed by the United States Congress. The latter, however, has under consideration a bill designed to remove many complexities of current customs procedures which tend to impede the importation of certain merchandise without actually contributing to the tariff protection of American industry. Mr. Adams added that the Department of State might be willing to consider some kind of general formula stressing the willingness of the two Parties to consult together about problems susceptible of administrative solution arising in the customs valuation field. Such a general formula could be expressed most appropriately in an exchange of notes. Mr. Adams further stated that a practicable proposal for an exchange of notes along these lines, if formulated by the Japanese side, could be referred to the Department of State for its consideration. He pointed out, however, that the United States was not in a position to deal with this subject in an FCN Treaty in view of the fact that the "American selling price" principle is a feature of United States customs valuation procedures.

Mr. Yukawa replied that he understood the position of the United States on this, and that he would inform the appropriate agencies of the Japanese Government of the Comments made by the American side.

Mr. Otabe then stated that there were a few more questions concerning Articles discussed at previous meetings. He added that the Japanese side would be ready within a few days to discuss these points, and that he believed two or three additional meetings would suffice for this purpose. Mr. Otabe then stated that after these additional meetings were concluded - possibly within the first week of May - the Japanese representatives would refer various pending questions to the Government agencies concerned. This period of consultation, he added, would require no more than three weeks, after which time the final review meetings of the present round of informal discussions could be held.

Mr. Bassin stated that it was his understanding that these final review meetings - which would therefore probably begin late in May or early in June - were for the purpose of clarifying any pending questions, as well as for identifying points for negotiation during the forthcoming formal meetings.

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Mr. Yukawa stated that this was also his understanding. He proposed that no definite date be set for the next meeting, and it was agreed that the Japanese representatives would inform Mr. Adams as soon as it was possible to hold the next meeting, probably in about ten days' time (about May 2, 1952).

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Enclosure 2
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American Embassy,
Tokyo.

MEMORANDUM FOR THE RECORD

Subject: Informal Discussions on the United States Standard Draft
Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Norio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OHSU, Vice Director, Economic Affairs Bureau
Mr. Haruki IOKI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KAWAHARA, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OHTSUKI, Chief, Fourth Section, Treaties Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau

For the

Mr. Jules B. F., Legal Attache
Mr. Dudley G. LIGER, Commercial Attache
Mr. Robert W. ADLER, Second Secretary

Place: Office of the Ministry of Foreign Affairs, Tokyo, Japan.

Date: Tuesday, May 6, 1952

FIRST WITH INFORMAL MEETING

ARTICLE VII
(Additional Discussion)

Mr. Yukawa asked for clarification of a point in Article VII of the standard draft, although the Japanese side, he added, had already submitted a proposal for a revised Article VII. He stated that the first sentence of paragraph 1, Article VII specified that national treatment would be accorded with respect to business activities. This is followed by a second sentence stating that "Accordingly, such nationals and companies shall be permitted... (b) to organize companies under the general company laws of such other Party, and to acquire majority interest in companies of such other party...". Mr. Yukawa added that paragraph 4 of the same Article further stipulates that most-favored-nation treatment is to be accorded with reference to the matters treated in this Article. It appeared therefore that the right to organize companies was to be granted on a most-favored-nation basis, since the national treatment concept contained in the first sentence of paragraph 1 apparently did not extend to the matters covered in the second sentence of that same paragraph.

Mr. Yukawa added, in substantiation of his interpretation that the right to organize companies is to be accorded on a most-favored-nation rather than on a national treatment basis, that paragraph 2 (c), Article VII of the United States

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FCN Treaty with Colombia clearly states that the right to organize, participate in and operate companies is to be accorded on a most-favored-nation treatment basis. Mr. Yukawa asked if the principles involved in the Treaty with Colombia and in the standard draft were similar in this respect.

Mr. Bas in replied that the Department of State considers the two articles under discussion alike, but that it believes that the standard draft formula is clearer. He added that it appeared that most-favored-nation treatment was to be accorded with respect to the right to organize companies.

Mr. Otabe stated that if most-favored-nation treatment was intended in the standard draft, as in the Treaty with Colombia, the construction of paragraph 1, Article VII of the standard draft required clarification. He stated that the right to organize companies "under the general company laws of the other Party" implied national treatment, since there was no qualifying statement to the effect that other regulations or restrictions concerning alien ownership might exist. Mr. Otabe proposed therefore that paragraph 1 (b), Article VII, be rephrased either to clarify that most-favored-nation treatment was intended, or, alternatively, that the phrase "general company laws" be so qualified as to acknowledge the existence of certain permissible restrictions on alien ownership, thus clearly indicating that full national treatment would not necessarily be accorded.

Mr. Adams replied that the Department of State would be requested for clarification as to whether national or most-favored-nation treatment was intended, and that the suggestions made by Mr. Otabe would be relayed to the Department for consideration of some appropriate qualifying phrase, if necessary.

Mr. Singer added that, in his opinion, the right to organize companies should be accorded on a basis as near that of national treatment as possible, although less than national treatment might be granted in some cases. He pointed out that once a company was so organized by nationals of the other Party, their activities would be governed strictly on a national treatment basis, as indicated by the third sentence of paragraph 1, Article VII.

Mr. Otabe then referred to paragraph 1 (c), Article VII of the standard draft (permitting nationals of either Party to control and manage enterprises which they have established or acquired) and to paragraph 1, Article VIII of the Treaty with Colombia (accord[ing] nationals of either party the right to control and manage enterprises which they have been permitted to establish or acquire). He asked whether there was any difference in substance between these two paragraphs, and also for information concerning the precise standard of treatment (national or most-favored-nation) intended in this connection.

Mr. Adams replied that the paragraphs of the two treaties under discussion were identical in this respect, and referred to Mr. Singer's previous statement to the effect that, once a company was organized or acquired, national treatment was intended in connection with its activities, control and management.

Mr. Yukawa then stated that paragraph 1 (a), Article VII of the standard draft permits nationals of either Party to establish and maintain branches, agencies, et cetera, appropriate to the conduct of their business. He added that the last

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sentence of paragraph 2 restates the right to maintain branches and agencies to perform functions necessary for essentially international operations in which transportation, communications and banking firms are permitted to engage. Since the right has already been granted in paragraph 1 (a), Mr. Yukawa added, clarification as to the need for its repetition in paragraph 2 was requested.

Mr. Adams replied that the three types of business firms mentioned by Mr. Yukawa were among those fields of activity covered by the reservation made in the first sentence, paragraph 2. Having established this reservation, the question would arise in the minds of businessmen whether agencies or branch offices of those particular types would be permitted. Thus, he added, the latter part of paragraph 2 modifies the initial general reservation, by excepting the establishment of branches or agencies for the specified international business activities.

Mr. Mori replied that the need for repeating this right with respect to transportation and communications companies was clear, since a sweeping reservation had been made earlier in the same paragraph. With reference to banking, however, only a partial reservation had been made, and this was for activities not coming within the scope of international operations. Therefore, added Mr. Mori, a bank engaged in international activities was already authorized to establish a branch under the terms of paragraph 1, and the additional mention in the latter part of paragraph 2 was unnecessary.

Mr. Singer replied that he believed Mr. Mori to be correct in his analysis, but added that a reiteration of this right with respect to banks would clarify this question for businessmen interested in the Treaty. He said that if banking were deleted from the latter part of paragraph 2, some confusion would arise because of the partial reservation made earlier in the same paragraph; although a treaty expert would reason this problem out along the lines indicated by Mr. Mori, the average businessman would find it most helpful if specific mention of banking were again made in the latter part of paragraph 2.

Mr. Yukawa stated that its reiteration in paragraph 2 was not objectionable to the Japanese side, and that it might assist the average businessman in understanding the Treaty.

Mr. Otake then asked for a clarification of the term "in which they are permitted to engage", as used in the latter part of paragraph 2. He inquired specifically if this phrase is intended to mean that either Party may refuse to extend such permission.

Mr. Bassin replied that the permit to engage in certain operations is already inherent in the Treaty, and is contained generally in paragraph 1, Article VII. This phrase therefore does not contemplate the right of either Party to refuse to extend such permission. Such permission, he added, is a treaty right, and one should look for such permission not only in Article VII, but also in other Articles of the present Treaty, as well as in other appropriate instruments (e.g. a civil air transportation agreement). Mr. Bassin added that the right to refuse permission for such activities arose only to the extent that the reservations in paragraph 2, Article VII, were encroached upon.

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ARTICLE IV
(Additional Discussion)

Mr. Adams referred to a previous discussion (2nd informal meeting, February 27, 1952) concerning the Japanese social security system, and stated that, while it was his understanding that the workmen's compensation and social security systems of Japan and the United States were similar despite some technical points of difference, a question had arisen as to the Japanese social security system in general. Mr. Adams asked if it could be clarified whether Japan's social security system was generally of the compulsory insurance type.

Mr. Otobe replied that, as previously indicated, while participation in the Japanese National Health Insurance system was entirely voluntary, other forms of workmen's compensation and social security systems in Japan were compulsory in nature, both employees and employers sharing the cost of the various programs. Among the compulsory systems, he added, were those covered by (a) the Laborer's Accident Compensation Insurance Law (Law No. 50 of 1947), which provides laborers with prompt and equitable protection against injury, disease, invalidity or death due to causes of occupational accidents or diseases, and which is binding on all enterprises employing more than five persons (except state undertakings), enterprises employing only members of a family living in the same household, and (b) the Welfare Pension Insurance Law (Law No. 60 of 1941), which provides for the payment of benefits in the case of old age, invalidity, death or retirement of persons employed by enterprises engaged in certain specified fields and employing more than five persons; (c) the Seamen's Insurance Law (Law No. 73 of 1939), which provides for the payments of benefits in case of sickness, injury, unemployment, old age, invalidity, retirement or death of seamen, who are defined in Article 1 of the Mariner's Law (Law No. 100 of 1947); (d) the Unemployment Insurance Law (Law No. 146 of 1947), which provides for unemployment compensation and is binding on enterprises except those specifically exempted in the law (such as agriculture, animal husbandry, research enterprises, non-profit social-work organizations, et cetera); and (e) the Health Insurance Law (Law No. 70 of 1922) (not to be confused with the voluntary National Health Insurance system), which provides for the payments of benefits to employees and their dependents in case of sickness, injury or death attributable to causes or sources outside their employment, and is applicable to enterprises engaged in manufacturing, mining, transportation, commerce and others, including offices and Government agencies. Additional rights are guaranteed to laborers, Mr. Otobe added, under the terms of the Laborer's Law (Law No. 100 of 1947) and the Labor Standard Law (Law No. 49 of 1947) which bound the employers to pay for certain types of medical service compensation, as well as for injuries and illness incurred in line of duty, funeral expenses, and compensation for the family of the deceased.

It was then agreed that the next informal meeting would be held on May 8, 1952.

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Enclosure 9

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American Embassy,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft
Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic
Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs
Bureau

For the American Embassy, Tokyo, Japan:

Mr. Jules BALSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the Ministry of Foreign Affairs, Tokyo, Japan.

Date: Thursday, May 8, 1952.

TWENTIETH INFORMAL MEETING

ARTICLE VII
(Additional Discussion)

Mr. Yukawa asked for an explanation as to why the term "aliens" is employed in the first and second sentences of paragraph 2. Mr. Kanematsu added that it would appear that a bilateral treaty should limit its references to the "nationals and companies of the other Party" in this connection, and should not employ the general term "aliens".

Mr. Singer replied that it was difficult, if not impossible, to frame a general and wide-sweeping reservation of the type specified in paragraph 2 except by using the term "aliens". He added that since such reservations were not limited in application to the "nationals and companies of the other Party", but were rather general reservations with respect to all foreign nationals, the use of such a phrase was inappropriate and would, moreover, advance an erroneous implication of discriminatory treatment.

Mr. Otabe stated that this explanation concerning the use of the word "aliens" was satisfactory, adding that this was a theoretical point in as much as the Japanese side had already proposed a revised Article VII.

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Mr. Yukawa then referred to that portion of paragraph 2 concerning "new limitations" and the fact that they "shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted...". With reference to the relation between this clause and the provisions of Article VI, Mr. Yukawa asked whether the taking of property for public purpose with just compensation under paragraph 3, Article VI would be in violation of paragraph 2, Article VII.

Mr. Bassin replied that the taking of property under paragraph 3, Article VI would not run counter to the provisions of Article VII. In answer to a further question from the Japanese side, Mr. Bassin added that it was impossible to say, except after study on a case-by-case basis, whether "nationalization" of a particular field of activity would be in violation of this particular clause on "new limitations". Generally, he said, a "limitation" was not imposed pursuant to a "nationalization" program; if an over-all nationalization plan were to be implemented by a Government, applicable to all alien ownership in a particular field of activity, it would probably not be considered in violation of paragraph 2, Article VII. The exact dividing line between a "new limitation" and a general "nationalization" program of a Government was difficult to establish in theory, and a case-by-case analysis would be required to determine whether "nationalization" was justified and whether it would over-ride the protection extended in paragraph 2.

Mr. Otake then referred to the first sentence, paragraph 2, Article VII (which reserves the right to limit the extent...) and to the second sentence of paragraph 4 of Article IX (which permits either Party to impose restrictions on alien ownership...). Mr. Otake asked whether this right to "limit" and to "impose restrictions" includes the right to prohibit such alien ownership.

Mr. Bassin replied that the right to prohibit such ownership was included in the right to limit or restrict. He added that since the limitation mentioned in Article VII is unqualified, the end-point is unsettled, and that it would therefore embrace the right to prohibit. Mr. Bassin further stated that the intent of the Treaty was to encourage commercial intercourse between the two countries and that it was desirable that such terms as "restrict" or "limit" be used rather than the harsher "prohibition", which might discourage the average businessman interested in the Treaty.

Mr. Yukawa then asked whether a Japanese marine transportation or shipping company engaged in essentially international operations (as mentioned in paragraph 2, Article VII) could lease lands, buildings and other real property in the United States in accordance with paragraph 1 (a), Article IX.

Mr. Bassin replied that a Japanese shipping firm could lease such properties in the United States under the terms of paragraph 1 (a), Article IX.

TICLES XI and XII
(Additional Discussion)

Mr. Otake then asked whether it was intended that national treatment be accorded under paragraph 3, Article XI (concerning the payment of taxes, fees and charges in general) and under paragraph 3, Article XII (concerning vessels) with

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respect to tonnage taxes, port taxes, lighthouse charges, quarantine charges, and pilot fees.

Mr. Adams replied that a single schedule of such port and other charges is published in the United States, and is applicable to American and foreign vessels alike. The treatment was therefore contemplated with respect to such charges. In a subsequent question by Mr. Otake, Mr. Adams stated that a single schedule of such charges was actually maintained in Japan, and that the national treatment stipulated with respect to these taxes and charges was considered appropriate by the Japanese side.

Mr. Otake then inquired whether either party could give assistance in the development of its national shipping (as provided for in Article 13 of the Convention of the Intergovernmental Maritime Consultative Organization, which is mentioned in paragraph 11 of the protocol to the United States FCH Treaty with Colombia). He further inquired whether such assistance was precluded under the terms of paragraph 4, Article XIX of the standard draft.

Mr. Adams replied that the provisions of Article XIX did not preclude action by either Government to assist in the development of its national shipping in accordance with the Convention mentioned by Mr. Otake.

ARTICLE VII

(Additional Discussion)

Mr. Otake then stated that the Japanese side understood that some states in the United States limit the exercise of certain professions to the citizens of the United States or to those who have declared their intention to become citizens. He asked for further clarification from the American side as to whether the present FCH Treaty would over-rule such state limitations, and also inquired whether the alternative to citizenship (i.e., the declaration of intent to become citizens) might be raised as a further bar to the exercise of certain professions by Japanese nationals.

Mr. Adams replied that, as previously stated by the American side, the provisions of paragraph 2, Article VIII (i.e., "shall not be barred...merely by reason of their alienage") was clear on this point. He further pointed to previous comment to the effect that such an FCH Treaty would become the supreme law of the land in the eyes of the United States. Thus, he added, conflicting state laws or regulations would be over-ruled by the Treaty. Mr. Adams further stated that the declaration of intent to become a citizen could not be used to bar foreign nationals from practicing certain professions, since paragraph 2, Article VIII could remove alienage bars without qualification.

Mr. Kanematsu then stated that it had been pointed out previously by the American side on a number of occasions that the provisions of the present FCH Treaty would, when ratified, become the supreme law of the land in the United States and that in consequence thereof any existing laws or regulations running counter to the Treaty provisions would inso facto be overruled. With reference to this point, Mr. Kanematsu asked whether such contrary laws and regulations would be regarded as null and void without further confirmation by a court or some

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other authority, if it was necessary to amend existing laws, or if court proceedings were necessary to secure or ascertain the rights guaranteed by the Treaty. He also asked when the validity of the Treaty provisions would be finally determined.

Mr. Bassin replied that the enforcement of Treaty provisions was a problem to be met in several ways; often an official of a particular state could make administrative rulings on its own laws and regulations in conformance with the Treaty provisions; in other cases it might be necessary for a state court to rule on a particular question. Mr. Bassin added that state laws might in some cases have to be amended, or in others might be voided by a competent court. The mechanics of enforcing Treaty provisions would probably vary from case to case, as well as from state to state. Mr. Bassin pointed out that the Treaty assured the right of access to the courts for the purpose, among others, of ensuring the implementation of Treaty rights. He added that the same questions raised by Mr. Kanematsu also existed on the American side with respect to the enforcement of the Treaty in Japan, and that it was understood that a number of procedures, none of which could be specified without assessing the facts in each individual problem, would be employed in Japan, as in the United States, to ensure the effectiveness of the Treaty.

Mr. Kanematsu then stated that it was obvious that Treaty provisions are subject to interpretation on both sides, and that the Supreme Court of the United States once rendered a decision to the effect that treaty provisions might remain merely on the level of international law binding on the two signatory countries, but having no validity as the supreme law of the land in the United States. In view of this previous interpretation, handed down many years ago, Mr. Kanematsu asked for clarification as to the recent tendencies of Supreme Court decisions in this connection, especially concerning treaty provisions related to such questions as the right to exercise certain professions and the acquisition of real properties by aliens.

Mr. Bassin replied that the Supreme Court of the United States has for a number of years taken a most liberal attitude in this connection, particularly with respect to the disability of alienage in the acquisition of certain rights. He pointed out that in recent times few cases involving this subject have been referred to the Supreme Court in view of the fact that lower courts have taken action with respect to the constitutionality of certain state laws and regulations containing discriminatory provisions. He pointed to a recent decision of the Supreme Court of California, which found a state law barring alien ownership of real properties unconstitutional, as an example of the liberal attitude of lower courts and of the Supreme Court in these matters.

ARTICLE XIII

(Additional Discussion)

Mr. Yukawa requested a definition of the term "commercial traveller" as used in Article XIII, and asked how a commercial traveller differs in status from a treaty merchant.

Mr. Adams replied that a commercial traveller was normally one who was admitted into a country on a temporary visa for a limited period of time. Under

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the United States Immigration Act of May 26, 1924, a commercial traveller would be admitted entry as a non-immigrant under Section 3 (2) of the Act for a temporary visit. Visas under Section 3 (2) were granted both for business and pleasure trips. A "treaty trader", to whom the privilege of indefinite sojourn in the United States would be granted for so long as the individual were engaged in trade and related activities between the United States and his country pursuant to a Treaty of Friendship, Commerce and Navigation, would be permitted entry into the United States under Section 3 (6) of the Immigration Act. Thus, while both the commercial traveller and the treaty trader were non-immigrants under United States' law, the former was admitted only for a short period of time, while the latter could remain in the United States indefinitely as long as his activities were in accordance with the covering CN Treaty.

ARTICLE XII
(Additional Discussion)

Mr. Otake then stated that it was understood that either Party could set different standards for the withdrawal of earnings for different fields of activity, provided there was no discrimination in the application of these standards. He added that it was also understood that different standards of control over various currencies could be established on the basis of a country's balance of payments position with respect to a particular currency. Mr. Otake asked if either Party could, therefore, set different standards for the withdrawal of earnings in different currencies, that is, one standard for the withdrawal of earnings from a sterling investment in a particular field of activity, and another standard for the withdrawal of earnings from a dollar investment in the same field of activity.

Mr. Adams replied that, while it had been previously stated that different degrees of exchange control might be established for different currencies on balance of payments grounds, it had been stated that this should not be done in a manner unduly discriminatory. It was believed that the establishment of different standards of withdrawal for different investments within a single field of activity would definitely be discriminatory. Since it would appear that a more favorable withdrawal or conversion rate would presently be extended to the pound sterling investor under such a system, the American investor or enterprise would operate at a distinct disadvantage. Mr. Adams cited as an example two shipping concerns operating to and from Japan - one, the British, might be permitted to convert into pounds sterling and remit almost all its earnings in Japan; the second firm, an American enterprise operating in dollars, would presumably be limited to a much lower percentage of convertibility and remittance. Such a situation, he added, would be frankly and unjustifiably discriminatory and would operate to discourage American dollar investment in Japan.

Mr. Otake asked for a definition of the word "welfare" as used in paragraph 3, Article XII.

Mr. Singer replied that this word was of broad meaning, and was used in Article XII with reference to a country's general well-being, including the necessities and minimum comforts for the maintenance of an adequate standard of living.

It was then agreed that the next informal meeting would be held on May 12,

1952.

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American Embassy,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft
Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takashi KANEWATSU, Secretary, First Section, Economic
Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs
Bureau

For the American Embassy, Tokyo, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the American Embassy, Tokyo, Japan.

Date: Monday, May 12, 1952

TWENTY-FIRST INFORMAL MEETING

ARTICLE XII
(Additional Discussion)

Mr. Otabe referred to paragraph 3, Article XII (concerning the provision for the withdrawal of earnings and others "in foreign exchange in the currency of the other Party"). He asked whether Japan would be required to convert earnings and dividends into dollars for remittance by an American national or company which had invested only pounds sterling in Japan.

Mr. Adams replied that this Article did not impose such a requirement under the present circumstances. He added that, while the present inconvertibility of certain currencies persists, there would be no requirement that the earnings or dividends accruing from an investment made in some currency other than United States dollars be made available for remittance in dollars. Mr. Adams added that such conversion into dollars of earnings from a non-dollar investment would, however, be appropriate if the identity of the original currency of investment were lost (e.g., if pounds sterling had been converted into Japanese yen for the purpose of investment, and the actual investment

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by the American national were thus expressed in yen only). Such a situation, however, would probably arise only when a greater degree of convertibility between various currencies was established, and the problem would be further clarified by the action of Japan's Foreign Investment Commission in approving the original investment. Since the Commission's favorable action is necessary to effect the investment itself, it would appear that agreement could be reached at that time between the Commission and the investor, and specific terms of future convertibility of earnings and dividends established, which would clarify whether dollar remittances would or would not be made available for a earnings from non-dollar investment.

ARTICLE XV (Additional Discussion)

Mr. Otake then asked whether the phrase "30 days after publication" referred only to administrative requirements and restrictions, as mentioned in paragraph 1 of this Article, or whether it referred also to the laws, regulations and administrative rulings mentioned in the first sentence of this paragraph.

Mr. Bassin replied that the phrase in question referred only to the new administrative requirements or restrictions mentioned in the second sentence of this paragraph. He pointed out that a previous statement had been made by American side (contained in the memorandum on the 12th informal meeting of April 1, 1952) on this point, and that it would appear that some regulations or administrative rulings might - if they established new administrative requirements or restrictions - come within the scope of the 30-day advance publication provision. Mr. Bassin added that the 30-day provision was not intended to apply to laws, which became effective whenever a sovereign state so decided (usually upon publication), since impending legislation which might effect import-export trade was usually well known to the interested official and business circles in advance of its promulgation.

Additional Discussion of Definitions

Mr. Otake asked for a clarification of the term "in like situation" as used in paragraphs 1 and 2, Article XIII. Mr. Singer replied that this could be interpreted to mean "under similar circumstances" or "in similar cases".

Mr. Kanematsu asked whether this phrase, "in like situation", would be used by the United States as a basis for the imposition of higher customs duties on Japanese articles - thus denying most-favored-nation privileges - on the grounds that Japanese goods were not manufactured under "like circumstances" (i.e.) lower labor costs in Japan as compared with those in the United States).

Mr. Singer replied that this phrase would not be so used by United States customs authorities, and, further, that the intent of Article XIII was to

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accord national or most-favored nation treatment, as the case might be, without qualification. Such treatment would be accorded in precisely the same manner as to nationals or to other countries "in like situations" (i.e., in similar cases or under like circumstances).

Mr. Otabe then asked, also in connection with Article XXII, whether it was possible for an American company to have its "permanent seat" outside the United States, and whether an American firm could be both an American company and a French company at the same time.

Mr. Bassin replied that if a company's "permanent seat" meant its domicile or place of incorporation, such a "seat" would definitely be in the United States. If the phrase used by Mr. Otabe meant a firm's principal or main office, it was possible that this be in some place other than its legal domicile, and that a "main office" (meaning its most important business office) could even be located outside the United States. He pointed out that many American concerns are established or incorporated in one state (where they may maintain a small office for legal purposes), but establish their principal places of business, or "main offices", in important cities, often in another state. Mr. Bassin added that an American company, duly organized under the laws in the United States, could not, without reorganizing or participating in another company, have the status simultaneously of a non-American company. If, for example, American stockholders held substantial interests in a French company, the latter would be regarded solely as a concern organized under the laws of France, having none of the attributes of an American company.

In connection with Article XXII and Article IX, Mr. Otabe asked for a clarification of the status of "territories" and "possessions" of the United States.

Mr. Adams replied that Alaska and Hawaii are the only areas under the domain of the United States presently having the status of "territories"; these are organized under an Act of Congress and have a special and separate form of local government in the expectation that they will ultimately be admitted into the Union as one of the United States. A government of a territory is similar to that of a State Government, but it is under the authority of the Federal Government. A "possession", on the other hand, has no form of quasi-State Government structure, and is a place or area which is a dependency of the United States under the sole jurisdiction of the Federal authorities.

With reference to Article XIX, paragraph 4, Mr. Fori asked whether the phrase "to and from the territories of the other Party" referred to "products that may be carried by vessel" or "the right to carry all products".

Mr. Singer replied that the phrase in question referred to the products that might be carried by vessel to and from the territories of the two Parties. He added, however, that this was not a matter of substance, since it was to be assumed that all the products of a country are susceptible of carriage by vessel between the two Parties.

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Mr. Mori stated that the reason clarification was requested, as in most of the cases under discussion during the present meeting, was for the purpose of making as precise a translation into Japanese as possible.

Mr. Yamamoto then stated, also with reference to Article XIX, that paragraph 4 contained the phrase "than that accorded like products", while paragraph 2, Article XVI used the phrase "than that accorded to like articles". He suggested that for the sake of consistency the word "to" be added to the phrase in Article XIX.

Mr. Adams replied that there was no objection to revising the clause in paragraph 4, Article XIX, to read "no less favorable than that accorded to like products . . .", and that this revision could be made of record for the purpose of these informal discussions.

With further reference to Article XIX, Mr. Otake asked for a definition of the word "haven", as used in paragraph 5.

Mr. Singer replied that the word "haven" in this connection meant any place of refuge, such as a harbor or sheltered anchorage, or other places of shelter or safety accessible to vessels in distress.

With reference to paragraph 3, Article XIX, Mr. Osato enquired whether the word "foreign" modified both "commerce" and "navigation" in the phrase "foreign commerce and navigation". He also enquired whether "friendly" referred both to "treatment" and "assistance" in paragraph 5, Article XIX.

Mr. Bassin replied that "foreign" referred both to "commerce" and "navigation", as used in paragraph 3. The word "friendly", however, would, for the purposes of translation, refer only to "treatment", since it was assumed that "assistance" of any kind implied a "friendly" assistance.

In connection with Article XVIII, Mr. Otake asked whether the word "suit" in paragraph 3 referred to criminal and all as civil suits. Mr. Bassin replied that this word referred to civil suits, and that the additional phrase in this paragraph, "other liability", would undoubtedly cover criminal cases if the situation arose. He pointed out that the purpose of the Article was to ensure that no special privileges were extended to publicly-owned or controlled corporations, et cetera, in this regard, so that it was to be assumed that they would be held responsible for criminal acts. Nothing in the FCM Treaty, added Mr. Bassin, would give the director of such a corporation immunity while abroad, despite the fact that he would probably be a Government official. If immunity were to be claimed by such an individual, it would be necessary, if appropriate, to base this claim on something other than the Treaty (e.g., diplomatic or official status, or some other agreement between the two countries).

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Mr. Kanematsu asked whether the words "to which" in paragraph 3, Article XVIII, referred to "taxation, suit, execution of judgement or other liability" to which these enterprises are subject, or whether they referred only to the "other liability". Mr. Bassin replied that the words "to which" referred to the entire preceding clause, beginning with the word "taxation . . ."

Mr. Otake then asked whether, in Article XVII, the "exclusive or special privileges", mentioned in paragraphs 1 and 2, referred to "monopolies", or "agencies", or both. Mr. Bassin replied that the phrase in question referred to both monopolies and agencies.

Also in connection with Article XVII, Mr. Ori asked whether the term "imports or exports", as used in the first part of paragraph 1, referred only to import and export products. Mr. Adams replied that this term more properly referred to the import and export trade of each country, "importation" and "exportation" in general, since its limitation to products might be unnecessarily restrictive. Mr. Adams added that it was proper to think in terms of import and export trade in general because invisibles might be involved, which would not be included in the concept of "products".

With reference to Article XV, Mr. Gasto enquired whether "administrative ruling" could be translated as "administrative decision". Mr. Bassin replied in the affirmative.

Mr. Kanematsu then asked for a clarification of the difference in meaning between regulations and rulings, as used in this Article.

Mr. Bassin replied that a ruling was normally a decision made by a competent administrative or judicial authority, usually based on problems of interpretation arising in a specific case, and often applicable only to that particular case. A ruling, for example, could be made in interpretation of a regulation. The latter, added Mr. Bassin, implied a prescribed rule or set of rules, usually uniform in nature, and of standard or general application. He added that a regulation could be drafted and formalized by a Government agency, and that it would then be administered by a competent - often a subordinate - official who might find it necessary to make administrative rulings or decisions on a case-by-case basis in order to implement the regulation in accordance with his interpretation.

Mr. Usato then asked whether the word "when warranted", as used in paragraph 2, Article XV, referred only to the word "correction". Mr. Singer replied that this interpretation of construction was correct.

Mr. Otake asked for an explanation of the difference between "fines" and "penalties" as used in paragraph 2, Article XV.

Mr. Bassin replied that a "fine" was the imposition of a penalty calling for the payment of a specific sum of money; "penalties", often a general term

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including "fines", would in this case refer to other punishments meted out by the authorities, such as the temporary loss of a license to do business, or other methods to penalize an individual or company for an illegal act.

With reference to Article XIV, Mr. Mori asked for a clarification of the meaning of the term "products destined for", as used in paragraph 1. He stated that it was necessary to define with some degree of precision the point at which products became "destined" for exportation to another country.

Mr. Singer replied that a product would normally be "destined" for export to a country whenever it was capable or susceptible of actually being exported. In some cases, however, particularly in the case of raw materials or unfinished goods, it was possible that goods would be "destined" for export whenever a commitment had been made by the exporter.

Mr. Otake then asked how manufactured goods would be considered "destined" for export to a particular country even before their manufacture. He stated that such an allocation of goods would be subject to the allocation of critical raw materials. Their manufacture could also have to be conducted on a most-favored-nation basis in respect to the ultimate buyer. It would, of course, be most difficult, if not impossible, to carry the interpretation of "destination" to that extreme point.

Mr. Adams replied that the most-favored-nation treatment standard established in Article XIV would not be applicable beyond the point of manufacture, and would have no effect on the allocation of critical raw materials. He added that a foreign buyer would normally be expected to place his orders with firms who had already acquired, or had been assured, the needed materials.

In connection with paragraph 4, Article XIV, Mr. Csato asked whether the phrase "of a non-commercial nature" referred both to "sanitary grounds" and to "other customary grounds". Mr. Bazzin replied that the phrase referred to both, but that, since "sanitary grounds" were clearly of a non-commercial nature, it was necessary to qualify only the phrase "other customary grounds".

With reference to Article XIV, Mr. Mori asked whether the clause beginning with the words "and other matters" referred only to "other matters" or to "customs and other matters". Mr. Bazzin replied that this clause referred to "customs and other matters".

Mr. Otake then asked whether the clause in Article XIV ("and regulations governing the exercise of their functions") was a subordinate clause following the word "and" or whether this paragraph could be read to mean "in respect of" and "other matters" and (in respect of) regulations governing the exercise of their functions".

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Mr. Bassin replied that the latter interpretation of this sentence was correct.

In connection with Article XII, Mr. Kanematsu asked for a definition of "financial instruments". Mr. Bassin replied that these were written acknowledgements or certificates pertaining to financial transactions; among them are letters of credit, drafts, cashier's checks, personal and travellers' checks, and all forms of negotiable documents referring to financial transactions.

Mr. Otake then asked whether the phrase "giving consideration to special needs for other transactions" in paragraph 3, Article XII, referred only to the preceding clause (c), or whether it referred to all the previous clauses (a), (b) and (c). Mr. Singer replied that this phrase had reference only to clause (c).

Mr. Mori stated that it was the understanding of the Japanese representatives that the phrase in question meant that Japan would make foreign exchange available for the withdrawal of amounts for amortization, depreciation, and capital transfers under clause (c) after consideration of Japan's special needs for other transactions (such as its contribution to the International Monetary Fund or other international obligations).

Mr. Adams replied that Mr. Mori's understanding in this connection was correct.

With reference to Article XI, Mr. Mori asked whether the term "gainful pursuit", as used in paragraphs 1 and 2 of this Article, had the same meaning as "gainful occupation", as used in paragraph 4, Article XXI.

Mr. Singer replied that "gainful occupation" is somewhat narrower in scope than "gainful pursuit"; the former implies "taking a job", and is therefore limited to the activities of an individual within the territories of the other Party (as evidenced by the phraseology employed in Article XXI); the latter phrase, "gainful pursuit", is much broader in character and may include numerous non-business activities. Moreover, added Mr. Singer, residence is not necessary to engage in some "gainful pursuit", as is clear from paragraph 4, Article XII, while residence is essential to a "gainful occupation". He added that he believed that these terms were correctly employed in the two Articles under discussion, and suggested that this distinction be carried into the Japanese translation.

With further reference to Article XI, Mr. Otake then asked for clarification of the words "allocable" and "apportionable", as used in paragraph 4. He added that there were Japanese terms equivalent to these English words, but that the former (and possibly the latter) were so much alike that it would

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appear best to use only one word in lieu of the present two. He suggested, therefore, that the word "apportionable" be deleted from this paragraph, leaving only "allocable". Mr. Otake stated that he believed that the latter word alone would suffice, but he invited the American side to comment on the need for both words.

Mr. Adams replied that these two words referred to the "income, capital or other basis" on which taxes were to be assessed. Article XI therefore stipulates that taxes, fees or other charges shall be imposed only on that portion of a foreign company's income or capital which is truly representative of its local branch's share of business profits or investment. The Article ensures that a Japanese company's branch in the United States, for example, will not be assessed taxes on a greater share of profits or investments than may reasonably be attributed to the branch itself, excluding the company's main office in Japan and its other foreign branches. In some business enterprises, added Mr. Singer, it is difficult to determine the exact return from an investment in some country or the extent of a company's profits, particularly where the company's operations are international in character. It was usual, therefore, for some companies to allocate or apportion a share of its total returns and of its total expenditures to each of its various branches. In order that all possible ways of determining this share, the standard draft uses both words, "allocable" and "apportionable"; the former implies the assignment or allotment of a share of total revenue on a percentage basis, often somewhat arbitrary and usually in unequal proportion; the word "apportionable", on the other hand, implies an equal division among the various participants. Mr. Adams then added that both words were used in the standard draft's phrase "or other basis in excess of that reasonably allocable or apportionable to its territories", as well as in the following clause concerning deductions and exemptions (which should not be less than those reasonably allocable or apportionable) simply in order to cover the various methods (proportionate or otherwise) by which a company's returns through a given foreign branch might be determined. Mr. Adams added that he would refer Mr. Otake's suggested deletion of one of these words to the Department of State, but that he believed the Department would agree with the American representatives that both words were necessary to paragraph 4, Article XI.

Mr. Kanematsu then enquired, with reference to Article IX, whether the word "occupying" (paragraph 2), used in connection with immovables, and the word "possessing" (paragraph 4), in connection with movable properties, had the same meaning.

Mr. Bassin replied that these words were not entirely alike, since ownership was not essential to occupation. Possession, which might be defined as "holding", usually implied ownership, the entire legal concept being best expressed in the phrase "to own and possess". As used in paragraph 4 of this Article, the word "possessing" referred to personal property of all kinds, and thus was a part of the full legal concept of ownership, i.e. "owning and possessing".

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Mr. Kanematsu then stated, with further reference to Article IX, that property in Japan is classified as tangible or intangible, and that tangible properties are further divided into movables and immovables. The "intangible personal properties" mentioned in paragraph 4 are of a category unknown in Japan. Mr. Kanematsu added that special intangible rights (such as mining rights, copyrights, et cetera) were recognized under Japanese law, but were not regarded as intangible personal properties. A debt, for example, was regarded in Japan as a movable personal property. Mr. Otake asked for an illustration of "intangible personal property" in the United States, and further enquired whether movable and personal properties came under the same laws in the United States.

Mr. Bassin replied that movable and personal properties were treated similarly in the United States. He added that the debts, copyrights and similar intangibles mentioned by Mr. Kanematsu would be regarded as intangible personal properties in the United States, and that it appeared that this concept was identical with that of "movable personal properties" or, in some cases, the special intangible rights mentioned by the Japanese side.

Mr. Otake then asked for a definition of the word "interests" as used in the phrase "alien ownership of interests in enterprises", paragraph 4, Article IX.

Mr. Bassin replied that "interests" meant shares, stocks, partnerships, mortgages, or any other kind of right susceptible of ownership.

In connection with Article VIII, Mr. Otake asked for an explanation of the meaning and scope of the term "executive personnel" in paragraph 1, and further enquired whether this term included employees holding the higher positions in a company.

Mr. Singer replied that this term meant the responsible officials of a company, including, but not limited to, directors and managers, and that it was regarded as covering the higher employees of a company.

With further reference to paragraph 1, Article VIII, Mr. Otake then asked if there was a clear-cut difference between the words "examinations" and "technical investigations".

Mr. Singer replied that examinations were more general in nature, and would include inquiries and surveys concerning investment possibilities, general business, financial, accounting and personnel problems. Technical investigations, on the other hand, were more specific in character, and would include, among other similar studies, those conducted by engineers, production experts, research personnel, laboratory and testing technicians, and other experts with respect to some specific aspect of investment, the establishment of a factory or enterprise, or the production of some article.

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Mr. Mori then asked whether the term "within such territories" at the end of paragraph 1, Article VIII, referred both to "their enterprises" and to "enterprises in which they have a financial interest". Mr. Bassin replied in the affirmative, that is, that the term "within such territories" applied to both the preceding clauses.

Mr. Otake then referred to Article V, and asked whether the term "access to the courts of justice and to administrative tribunals and agencies" in paragraph 1 was intentionally broader than the term "access to courts" as used in paragraph 1 (c), Article XXI. Mr. Bassin replied that "access to courts" in the latter Article was interpreted to mean "access to the courts of justice and to administrative tribunals and agencies", as used in Article V.

Mr. Otake stated that if this were the proper interpretation he believed that the phrase "access to courts" in Article XXI should be expanded to include the phraseology of Article V since this would then be consistent as well as clearer to the Japanese side.

Mr. Adams stated that for the purposes of these informal discussions, the latter part of paragraph 1(c) Article XXI would be amended to read "and with respect to access to the courts of justice and to administrative tribunals and agencies" as proposed by the Japanese side, and that this point would be referred to the Department of State of its consideration.

Mr. Kanomatsu then asked, with reference to Article I, for a clarification of the word "persons", and its relation to the phrase "of nationals and companies".

Mr. Bassin replied that the word "persons" in this connection meant the "bodies" of the nationals mentioned. Legally, he added, a "person" was any human being, corporation, or body having legal rights and duties. Thus, the word "persons" might properly be translated in such a way as to express both the idea of the "bodies" of the individual nationals, as well as of the "personalities" of the companies. Mr. Bassin added that, with respect to companies, mention was made of "property, enterprises and other interests". No specific mention was made, however, (other than by so interpreting the word "persons") of the juridical status or existence of such companies. Thus, the concept of "persons" or "bodies" should properly be interpreted to cover both the physical bodies of the individual nationals and the existence of the companies mentioned.

Mr. Otake then referred to the phrase "within the territories of the other Party", used in several places throughout the present FCN Treaty. He stated that the Japanese side desired to insert this phrase in several additional places, or to change the location of this phrase within some of the sentences where it is now found. He accordingly proposed that paragraph 2, Article II, which now reads "Nationals of either Party, within the territories of the other Party, shall be permitted . . .", be revised to read

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"Nationals of either Party shall, within the territories of the other Party, be permitted . . ."

Mr. Adams replied that there appeared to be no objection to such a change in phraseology, and stated that this revision could be made of record for the purposes of these informal discussions, subject to approval by the Department of State.

Mr. Otabe then proposed that paragraph 1, Article III, which now reads "Nationals of either Party within the territories of the other Party shall be free from unlawful molestations . . .", likewise be amended to read "Nationals of either Party shall, within the territories of the other Party, be free . . ."

Mr. Adams replied Mr. Otabe's proposed amendment would be made of record for the purposes of these informal discussions, and would be referred to the Department of State for consideration.

Mr. Otabe then proposed that paragraph 1, Article V, which now reads "Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, . . .", likewise be revised to read "Nationals and companies of either Party shall, within the territories of the other Party, be accorded . . ."

Mr. Adams replied that the phrase "within the territories . . ." in this phrase referred to the courts, tribunals and agencies, and not necessarily to the "nationals and companies". Reference to the latter alone would imply that access to the courts, et cetera, would be accorded only to those nationals and companies who were within the territories of the Party. Such a limitation, based on the concept of residence, was not believed to be intended by the first sentence, paragraph 1, Article V. However, he added, the second sentence of this paragraph clearly extends the same privilege of such access to courts, et cetera, to non-resident companies. It was therefore believed that the change proposed by Mr. Otabe, while modifying the original intent of the standard draft to some extent, might be acceptable in view of the extension of this privilege to non-resident companies in the second sentence of this paragraph. Mr. Adams suggested therefore that the revision proposed by Mr. Otabe be made of record tentatively pending its consideration by the Department of State.

Mr. Otabe then proposed that paragraph 3, Article IX, which now reads "Nationals and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party . . ." likewise be amended to read "Nationals and companies of either Party shall, within the territories of the other Party, be permitted . . ."

Mr. Adams replied that the phrase in question clearly referred to the properties, and not to the nationals and companies, within the territories of the other Party. He believed that an amendment as proposed by Mr. Otabe would

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imply that only the nationals and companies resident within the territories of the other Party could dispose of their properties freely, whereas the intent of this Article was to ensure that nationals and companies, whether resident or not, might dispose of their properties in the other country. The all-inclusive concept with reference both to residents and non-residents was clarified by the mention of acquisition through testate or intestate succession. He added that it was believed that Mr. Otake's proposal with respect to this particular paragraph would probably not be favorably considered by the Department of State for the reasons cited above. Mr. Adams added, however, that Mr. Otake's proposal would be referred to the Department of State.

It was then agreed that Mr. Mori and Mr. Miyagawa would, at their earliest convenience, discuss with Mr. Adams the corrections and additions to the various memoranda of conversation which might be proposed by the Japanese side. It was agreed that efforts would be made to expedite the preparation of final texts of these memoranda acceptable to both sides. Mr. Otake then stated that further consultation with other interested Ministries of the Japanese Government, on the various points discussed during these informal meetings would begin shortly. It was agreed that the final review meetings of the present round of informal discussions could be held in about three weeks' time (i.e., about the second week in June, 1952). It was further agreed that the primary purpose of the final review meetings was to confirm previously proposed amendments to the standard draft which might be acceptable to both sides, and to establish and clarify the points, if any, which might remain for formal negotiation.

The meeting was then adjourned with the understanding that final review meetings would begin on or about June 9, 1952, subject to mutual agreement.

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